

NO. 92631-0

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

v.

CYNTHIA L. AIKEN,

Respondent.

FILED E
OCT 10 2016
WASHINGTON STATE
SUPREME COURT

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**BRIEF OF AMICUS CURIAE
NORTHWEST JUSTICE PROJECT**

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I. INTRODUCTION

The Washington Legislature enacted the Domestic Violence Prevention Act (DVPA) in 1984, which created the domestic violence order for protection (DVPO). The DVPA was designed so that victims of domestic violence could quickly and easily request protection from the courts *without* the need for legal representation.

The Appellant, Mr. Aiken, argues that he has a *right* to depose and/or cross-examine his 14-year old daughter in the DVPO case filed against him. This Court in *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006), held that the need for live testimony and cross-examination should be determined on a case-by-case basis in DVPO proceedings. The Court of Appeals in *Scheib v. Crosby*, 160 Wn. App. 345, 351-353 249 P.3d 184 (2011) held that DVPO cases are special proceedings. Depositions may be allowed but should also be determined on a case-by-case basis.

Mr. Aiken's position is extreme and against Washington's public policy. If adopted, it will have a profound chilling effect on victims of domestic violence. Having been abused and coerced, they will be reluctant to participate in a proceeding that gives their abuser license to further harass and intimidate them and their children. Effectively, allowing depositions and/or cross-examination of children in DVPO

proceedings will leave domestic violence victims without the protections the DVPA was designed and intended to provide.

II. INTEREST OF AMICUS

The interest of amicus Northwest Justice Project (NJP) is fully set out in the Motion to Participate as Amicus Curiae.

III. STATEMENT OF THE CASE

Amicus adopts Ms. Aiken's statement of the case as set forth in her Supplemental Brief and in her response to the Petition for Review.

IV. ARGUMENT

A. Testimony from children is disfavored by the Legislature and by the courts.

“Victims of domestic violence often suffer a broad range of psychological difficulties including depression, post-traumatic stress disorder (‘PTSD’), extreme anxiety, and substance abuse.”¹ “Victims experiencing PTSD may have extreme difficulty concentrating, feel constantly on guard or jumpy, and experience unpredictable outbursts of rage.”²

“Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness

¹ Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victim's Long-Term Safety in the Prosecution of Domestic Violence Cases*, GEO. J. GENDER SOC. POL'Y & L. 465, 474 (2003).

² *Id.*

and the accused. Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.”³

The Legislature enacted statutory protections to alleviate the necessity for children to testify in family law and criminal cases because it understood that they are especially sensitive to courtroom proceedings and providing live testimony. Had the Legislature intended for DVPO proceedings to require live testimony, including cross-examination, it would have enacted statutory protections similar to those available in family law and criminal cases.

1. The Legislature enacted protections to prevent children from providing testimony in family law cases.

In 1973 the Legislature enacted RCW 26.09.210 to allow for in chamber interviews of children in family court proceedings. RCW 26.09.210 states:

The court may interview the child in chambers to ascertain the child's wishes as to the child's residential schedule in a proceeding for *dissolution of marriage or domestic partnership, legal separation, or declaration of invalidity*. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be made part of the record in the case.

(emphasis added). Even so, “[c]ourts do not usually allow children to be

³ Judith Lewis Herman, *Justice From the Victim's Perspective*, VIOLENCE AGAINST WOMEN, 571, 574 (2005).

made part of the courtroom drama, and few courts will interview in chambers.”⁴

In Parenting Act proceedings a guardian ad litem may also be appointed pursuant to RCW 26.12.175.

A guardian ad litem is not appointed as an ‘expert.’ Rather, she is appointed to investigate the child and family situation for the court and make recommendations. In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court.

Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997).

“One of the important contributions a GAL makes is to report on the children and to give the children a voice in court.”^{5,6}

2. The Legislature enacted protections to prevent children from testifying in criminal law cases, despite a criminal defendant’s right to confrontation.

In 1982 the Legislature enacted a hearsay exception in criminal and dependency proceedings for children who may have been victimized. RCW 9A.44.120. This Court in *State v. Shafer*, 156 Wn.2d 381, 392, 128 P.3d 87 (2006), determined that this statute “is constitutional to the extent it permits the admission of a child’s nontestimonial statements.”

The Legislature enacted RCW 9A.44.150 in 1990, which allows

⁴ Washington State Bar Ass’n, *Washington Family Law Deskbook* § 21.4(2) at 21-18 (2d ed. 2000 & Supp. 2012).

⁵ *Id.*

⁶ The use of a guardian ad litem does not violate a party’s right to due process. See *In re Parentage of L.B.*, 153 Wn.2d 646, 655, 105 P.3d 991 (2005).

children under the age of fourteen, who may have been victimized, to testify via one-way closed-circuit television, rather than in the physical presence of a defendant.⁷ In enacting RCW 9A.44.150, the Legislature found:

The legislature declares that protection of child witnesses in sexual assault and physical abuse cases is a substantial and compelling interest of the state. Sexual and physical abuse cases are some of the most difficult cases to prosecute, in part because frequently no witnesses exist except the child victim. *When abuse is prosecuted, a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court.* In rare cases, the child is so traumatized that the child is unable to testify at trial and is unavailable as a witness or the child's ability to communicate in front of the jury or defendant *is so reduced that the truth-seeking function of trial is impaired.* In other rare cases, the child is able to proceed to trial but suffers long-lasting trauma as a result of testifying in court or in front of the defendant. The creation of procedural devices designed to enhance the truth-seeking process and to shield child victims from the trauma of exposure to the abuser and the courtroom is a compelling state interest.

Laws of 1990, ch. 150, § 1 (emphasis added) (Legislative finding). This Court found RCW 9A.44.150 constitutional in *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998).⁸ The Supreme Court of the United States has

⁷ RCW 9A.44.150 originally applied to children under the age of ten, but the Legislature expanded its applicability to children under the age of fourteen in 2013. Laws of 2013, ch. 302, § 9.

⁸ The "use of closed-circuit testimony, when necessary and under the procedures and protections outlined in RCW 9A.44.150, does not violate a defendant's right to confront the witnesses against him or her, as guaranteed by article I, section 22 of our state constitution and by the Sixth Amendment." *Foster*, 135 Wn.2d at 470.

also ruled closed-circuit testimony constitutional.⁹

There is a growing trend “to allow special procedural accommodations for child witnesses,” when testimony is absolutely necessary. *State v. Dye*, 178 Wn.2d. 541, 556, 309 P.3d 1192 (2013). For example, in *Dye*, this Court determined that a trial court did not abuse its discretion in allowing a comfort dog to accompany a victim witness during his testimony. Comfort dogs have an immense positive impact on child witnesses.¹⁰

Even if a child testifies in a criminal proceeding, a prosecutor is present who can elicit testimony and make objections. On the other hand, the vast majority of DVPOs are filed by legally unsophisticated pro se litigants. Victims of domestic violence filing for a DVPO typically have a myriad of other concerns, legal issues and barriers to contend with when

⁹ “In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.” *Maryland v. Craig*, 497 U.S. 836, 855–56, 110 S. Ct. 3157, 111 L. Ed. 2d. 666 (1990).

¹⁰ “A dog calms and comforts a child witness, allowing vital testimony to be heard, and being in an animal's presence lowers a person's blood pressure and heart rate. Further research discloses that animals are particularly encouraging for children suffering from stress or trauma. A child witness accompanied by a court facility dog can speak more clearly and articulately, allowing the court to hear coherent testimony.” Casey Holder, Note, *All Dogs Go To Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant's Right to a Fair Trial*, 50 HOUS. L. REV. 1155, 1179 (2013).

attempting to stop the cycle of violence.^{11,12} Learning the law and procedure is unlikely to be on that list.

If a right to depose and/or cross-examine children is found by this Court, respondents in DVPO proceedings would be given more rights than those guaranteed to defendants in criminal cases.

3. Appellant seeks to depose and/or cross-examine his 14-year old daughter to intimidate and not for the truth.

Mr. Aiken argues that the truth will come out in the courtroom through a deposition and/or cross-examination, even though Washington's long-standing public policy dictates otherwise. This Court has also acknowledged that cross-examination may very well be used for non-truth seeking purposes: "The nature and purpose of witness examination, however, are to elicit honest testimony, *not fearful responses, and to procure the truth, not cause intimidation.*" *Foster*, 135 Wn.2d at 465, (emphasis added).

¹¹ The 2015 *Washington State Civil Legal Needs Study Update* found that "[l]ow-income Washingtonians who have suffered domestic violence or been a victim of sexual assault experience an average of 19.7 legal problems per household, twice the average experienced by the general low-income population." Washington State Supreme Court Civil Legal Needs Study Update Committee, *The Washington State Civil Legal Needs Study Update* 13 (Oct. 2015), available at http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf (last visited Sept. 26, 2016). (emphasis added). Additionally, only "24% of the [low-income] households that had one or more legal problems received some kind of assistance in 2014." *Id.* at 15.

¹² Victims face numerous barriers when attempting to break the cycle of violence, such as the escalation of violence by an abuser, lack of economic resources, which includes lack of representation, victim-blaming attitudes, psychological physical harm resulting from physical harm, among others. See State Gender and Justice Commission, *Domestic Violence Manual for Judges*, at 2-47 (2015 rev.).

Mr. Aiken's actions in the DVPO case demonstrate a true intention of victim intimidation. His attorney deposed Ms. Aiken and appears to have deposed her family members as well.¹³ During Ms. Aiken's deposition, his attorney questioned her pertaining to the location of their daughter's medication, which she used to cause self-harm and attempt suicide. CP 115-116. The attorney appeared to intimate that Ms. Aiken was careless in allowing the child access to her medication. CP 115-116. What would the 14-year old be asked? Would she be asked whether she feigned her attempts at self-harm? Would it be intimated that her attempts at harm were for attention? What is there to be gained in deposing or cross-examining her?

It is also interesting that Mr. Aiken did not seek to depose the children's therapist (who Mr. Aiken repeatedly claimed was biased against him), the school counselor and nurse, the psychiatrist who treated the daughter, and treating hospital staff. All of these individuals had significant knowledge about the domestic violence incidents disclosed by the parties' 14-year old daughter and her attempts at self-harm and

¹³ Ms. Aiken's counsel made reference that Mr. Aiken also sought to depose her mother, father and sister-in-law. CP 145. During Ms. Aiken's deposition on January 9, 2015, Mr. Aiken's counsel made reference to deposing Ms. Aiken's father earlier that day. CP 131. However, Mr. Aiken failed to file any deposition transcripts other than Ms. Aiken's with the superior court.

suicide.¹⁴

Amicus urges that this Court find no explicit *right* to depose and/or cross-examine children in DVPO proceedings.

4. If this Court determines that children may be deposed and/or cross-examined in domestic violence order for protection proceedings, then the Court should require the appointment of counsel.

Amicus asserts that counsel should be appointed to represent children in DVPO proceedings if they are deposed and/or cross-examined, as the situation here is unique. Ordinarily a parent petitions on behalf of a child in a DVPO proceeding. RCW 26.50.020(1)(a). However if a child is deposed and/or cross-examined, most parents, especially those who are pro se, will be unable to protect them. The parent will need to balance the benefit of protections available in a DVPO versus the risk of exposing their child to additional harm in a deposition or in a courtroom, even after they may have already been victimized or exposed to domestic violence.

In *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007), this Court determined that no right to counsel exists in dissolution proceedings.

Amicus asserts that the arguments presented by the Appellant in *King* are applicable here. The Legislature made it Washington's priority to protect

¹⁴ Relevant portions of the record reflecting the knowledge of each of these individuals is as follows: the children's therapist, CP 383, 392, 446, 450, 464; the psychiatrist, CP 331; the school counselor and nurse CP 164-165, 169, 172, 262; and hospital staff, CP 347, 353, 356.

victims of domestic violence and children. Without an attorney in these particular cases, victims and children will lack meaningful access to a DVPO and will be placed in jeopardy.

B. Allowing depositions and/or cross-examination of children in domestic violence order for protection proceedings will transform their nature and undermine their purpose.

1. Domestic violence order for protection proceedings pursuant to RCW 26.50 were designed by the Legislature to be pro se friendly.

As this Court previously noted, since the DVPA's enactment "[t]he Legislature has since amended the DVPA several times to improve the protection order process so that victims have ...*easy, quick, and effective access to the court system.*" *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 209-210, 193 P.2d 125 (2008), citing Laws of 1992, ch. 111, § 1 (emphasis added). "The Legislature's creation of means to prevent, escape and end abuse is indicative of its overall policy of *preventing domestic violence.*" *Id.* (emphasis added).¹⁵ Allowing children to be deposed and/or cross-examined would effectively nullify the DVPA and its amendments intended to make obtaining a DVPO a quick and efficient process. It would instead make DVPOs procedurally complicated and

¹⁵ In amending the DVPA in 1992 the Legislature found: "Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse." Laws of 1992, ch. 111, § 2 (Legislative finding).

open to abusive litigation.¹⁶

The DVPA is a complex statute replete with technical provisions. However, the Legislature has taken great care to ensure that DVPO proceedings in practice occur in such a way that pro se litigants can represent themselves, while affording respondents due process.¹⁷

Understanding that most victims of domestic violence are pro se, the domestic violence advocate privilege was enacted in 2009.¹⁸ In enacting the privilege, the Legislature “recognize[d] that advocates help domestic violence victims by giving them the support and counseling they need to recover from their abuse, and by providing resources to achieve protection from further abuse.” Laws of 2006, ch. 259, § 1 (Legislative finding). As a result, domestic violence victims are able to speak freely to non-attorney advocates without fear of intrusion, on the same basis as with

¹⁶ “Abusive litigation” is a term describing “a range of tactics that survivors and their advocates have reported that abusers often use in connection with court proceedings in order to control, harass, intimidate, coerce, and/or impoverish survivors.”

David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, SEATTLE J. FOR SOC. JUST. 429, 432 (2015).

¹⁷ Some of the pro se friendly provisions of the DVPA are as follows: removal of filing fee provision so that victims may file for a DVPO without charge (Laws of 1995, ch. 20, § 3 and § 5); the creation of a standard and easy to understand petition with input from domestic violence organizations (Laws of 1993, ch. 35, § 3); allowing service by mail of the petition and temporary order on a respondent (Laws of 2008, ch. 287, § 3); expanding the definition of victim to include teenagers so that they may also request relief from abuse (Laws of 2010, ch. 274, § 302); and allowing hearings by phone so that a victim need not be present in the courtroom with a respondent (Laws of 2008, ch. 287 § 2), among many others.

¹⁸ See *supra* n. 11.

an attorney.¹⁹

Court Rules favorable to pro se litigants were also adopted. In 2001, General Rule (GR) 24 was adopted to define the practice of law and to “control more closely the persons who are permitted to *perform lawyer-like functions*, but are not members of the bar.”²⁰ GR 24 explicitly excludes from the definition of the practice of law individuals who provide “assistance to another to complete a form provided by a court for protection under RCW chapters 10.14 (harassment) or 26.50 (domestic violence prevention) when no fee is charged to do so.” This vastly expands the ability of domestic violence victims to obtain assistance without the need of an attorney in DVPO proceedings. Additionally, Evidence Rule 1101, last amended in December 2015, excludes DVPO proceedings from the Rules of Evidence, making it easier for either party to provide necessary evidence to the court without the formality of the Rules of Evidence.²¹

2. Requiring children to be deposed and/or cross-examined as part of domestic violence order for protection proceedings would eviscerate the Domestic Violence Prevention Act.

If respondents in DVPO proceedings are able to subject children

¹⁹ The attorney client privilege is codified in the same statute. See RCW 5.60.060(2).

²⁰ Karl B. Tegland, *Washington Practice: Rules Practice*, GR 24 (8th ed. 2016).

²¹ In *Gourley*, 158 Wn.2d at 466, this Court held that ER 1101(c)(4) “allows courts to consider hearsay in chapter 26.50 RCW protection order proceeding[s].”

to depositions and/or cross-examination, these proceedings will transform from a fast, simple method for pro se victims to seek protection into intensely litigious proceedings. This would defeat its very purpose.

The additional procedural complexity will impair the ability of victims to seek protection pro se. It will no longer be enough for non-attorney victim advocates to provide lay assistance in filling out the petition. Will courts appoint counsel? If not, then this one change would effectively nullify the changes the Legislature and this Court have made to enable victims' advocates to provide the assistance victims need in order to seek protection.

Even worse, a deposition and/or cross-examination will provide additional opportunities for a respondent to threaten, harass, and intimidate victims and their already traumatized children. There will be no prosecutor to object, as in criminal cases; and no appointed counsel to protect them; and in depositions, no judge or commissioner to intervene in unscrupulous questioning. Pro se victims will have to decide whether a DVPO is worth subjecting their children to interrogation and emotional abuse from the very person from whom the children needs protection.

C. The Domestic Violence Prevention Act and Parenting Act exist as part of a statutory framework to alleviate the need for the deposition and/or cross-examination of children in domestic violence order for protection proceedings.

Appellant argues in part that due process requires that he be allowed to depose and/or cross-examine his 14-year old daughter. Appellant couches this argument in his loss of contact with her and the improper use of a DVPO to obtain an advantage in future Parenting Act proceedings.²² The Legislature enacted the DVPA and Parenting Act as part of a statutory framework that addresses these concerns.

In 1987 the Legislature enacted the Parenting Act, RCW 26.09, et seq., which “substantially changed the law of Washington as to minor children.”²³ It did so by “eliminat[ing] the ideas of custody and visitation and divid[ing] the custodial rights and duties between the parents into two categories: (1) decision making and (2) residential time.”²⁴ Other “major concepts” of the Parenting Act include “specific articulation of how the ‘best interest of the child standard’ is met” along with “requiring specific ‘parenting plans’ to be set forth for the children.”²⁵ “The concept of the ‘parenting plan’ is the main focus of Washington parenting laws.”^{26,27}

²² In his Petition for Review Mr. Aiken argues that “These sorts of actions, however, also carry with them the ready ability for abuse of the court system.” David Aiken Pet. for Rev. at 8. However nothing in the record indicates that the DVPO in this case was filed for the purpose of obtaining a benefit in a subsequent parenting plan action. Mr. Aiken failed to present any information regarding the final outcome of his own dissolution action and the permanent parenting plan addressed therein.

²³ Washington State Bar Ass'n, *Washington Family Law Deskbook* § 47.2 (2d ed. 2000 & Supp. 2012).

²⁴ *Id.* § 47.3(1)(a).

²⁵ *Id.*

²⁶ *Id.*

1. The Domestic Violence Prevention Act and Parenting Act operate in a framework that addresses immediate safety and future contact with a child.

The Parenting Act addresses future contact with a child, and the DVPA addresses issues of immediate safety. The framework exists as a result of their various statutory connections and those connections as interpreted by case law.

When amending the DVPA in 1992, the Legislature limited the duration of a DVPO to one year, when those protections include the parties' children. RCW 26.50.060(2). This amendment also requires courts to provide petitioners with specific instructions on obtaining longer-term relief, past one-year, pursuant to the Parenting Act. RCW 26.50.060 (2) states: "the *court shall* advise the petitioner that if the petitioner wants to continue protection for a period beyond one-year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may seek relief pursuant to the provisions of *chapter 26.09* [Parenting Act] *or 26.26 RCW* [Uniform Parentage Act]."²⁸

The Legislature understood the need not to compromise safety in a DVPO proceeding and prohibited courts from requiring petitioners to file

²⁷ While parenting plans are discussed several times throughout this brief, the mandatory parenting plan form is comprehensive, unlike the DVPO mandatory form. The parenting plan form is "FL All Family 140" which may be found on the Washington Courts' website: <http://www.courts.wa.gov/FORMS/index.cfm?fa=forms.static&staticID=14>

²⁸ RCW 26.50.025(2) prohibits courts from denying or delaying a DVPO on the basis that relief is available in any other legal proceeding. *See infra* n. 30.

a Parenting Act case in lieu of a DVPO proceeding. RCW 26.50.025(2) prohibits courts from denying or delaying a DVPO on the basis that relief is available in any other legal proceeding.²⁹

The Legislature still recognized parenting issues could, if one or both parties so choose, be addressed pursuant to the Parenting Act.

If a party files an action under *chapter 26.09, 26.10, or 26.26 RCW*, an order issued previously under this chapter between the same parties may be consolidated by the court under that action and cause number. Any order issued under this chapter after consolidation shall contain the original cause number and the cause number of the action under chapter 26.09, 26.10, or 26.26 RCW.

RCW 26.50.025(2) (emphasis added).

Another statutory reference to the framework includes the DVPA's requirement that residential provisions entered in a DVPO be consistent with the Parenting Act. These residential provisions are intended to remain in place pending optional resolution in a permanent parenting plan.³⁰

The Parenting Act requires that restrictions on a parent's decision making and residential time in a permanent parenting plan be imposed when a parent has engaged in domestic violence or other conduct that

²⁹ See *Juarez v. Juarez*, No. 33668-9-III, 2016 West 4706535, at *4, *12 (Wn. Ct. App. Sept. 8, 2016).

³⁰ RCW 26.50.060(1)(d) states that "[o]n the same basis as provided in chapter 26.09 RCW, the court *shall* make residential provision with regard to the minor children of the parties. However, parenting plans as specified in chapter 26.09 RCW *shall not* be required under this chapter." RCW 26.50.060(1)(d) (emphasis added).

could negatively impact a child. RCW 26.50.191. The finding of domestic violence in a DVPO proceeding *does not* automatically lead to restrictions in a permanent parenting plan. RCW 26.50.191(2)(n) states as follows: “The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is *within the discretion of the court.*” (emphasis added). The fact that a DVPO has been entered, which restricts contact, may be evaluated as part of the information leading to the permanent parenting plan’s entry, but is *not* dispositive in a Parenting Act action. In other words, the entry of a DVPO will *not* provide one parent an advantage.³¹

The operation of the DVPA and Parenting Act as described by case law when a DVPO is issued *post-entry of a permanent parenting plan* is invaluable to comprehend the statutory intent and framework. A DVPO entered *post-entry* of a permanent parenting plan “cannot actually suspend a parenting plan” but rather may *only* suspend the provision between a respondent and his or her children. *In re Marriage of Stewart*, 133 Wn. App. 545, 544, 547, 137 P.3d 25 (2006). In circumstances where a DVPO

³¹ Amicus notes that once a DVPO has been entered that a number of other considerations may impact a subsequent parenting plan action. These would include whether coercive control exists and the use of a lethality assessment. Additional considerations should also include whether the respondent has successfully engaged in batterer’s treatment, supervised visitation, and whether there has been a prolonged period of not engaging in domestic violence. The existence of the DVPO is not more dispositive of a permanent parenting plan than the dangerousness of the domestic violence committed and the actions taken by respondent to address the propensity to commit domestic violence.

is entered and there is also a permanent parenting plan in place, the DVPO is considered to be a “[a] temporary proceeding pending further proceedings.” *Id.* Those further proceedings include those leading to the entry of another parenting plan pursuant to RCW 26.09. *Juarez v. Juarez*, No. 33668–9–III, 2016 West 4706535, at *4, *12 (Wn. Ct. App. Sept. 8, 2016).

2. In this case, the Domestic Violence Prevention Act and Parenting Act framework provided the necessary due process.

The structure of the DVPA and Parenting Act framework not only guaranteed Mr. Aiken due process, but refute his argument that a danger exists for litigants to improperly use DVPO proceedings to obtain an advantage in parenting plan proceedings. These are common, untruthful, and dangerous arguments against DVPO proceedings and have no merit.³²

³² “Attorneys in reviewed [Washington State] cases were reluctant to raise the issue of domestic violence in dissolution and custody proceedings for a range of reasons. Some felt that judges and commissioners were likely to see the victim’s raising the issue of domestic violence as an attempt to gain advantage and would be predisposed against her as a result. In one reviewed case, the victim’s petition for dissolution did not include any information about her fear of her husband’s violence, despite the fact that he had twice violated a civil Protection Order, had threatened her with a loaded gun, and had threatened suicide. After the victim was murdered by her husband, her attorney inaccurately characterized the case as “one in a million,” illustrating his lack of information about domestic violence and the risks to victims after separating from abusers. The attorney further expressed the belief—despite his own client’s murder—that litigants misuse domestic violence allegations to gain advantage in dissolution proceedings. Review panels found that attorneys and judicial officers commonly share the dangerous misconception that women’s claims of domestic violence in dissolution cases are false or exaggerated.”

WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, UP TO US! LESSONS LEARNED AND GOALS FOR CHANGE AFTER THIRTEEN YEARS OF THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW, 33 (2010).

The superior court's initial decision and decision on the motion for reconsideration were conservative in relief granted and consistent with the DVPA and Parenting Act framework. The superior court initially entered a one-year DVPO that limited Mr. Aiken from causing physical abuse and from harassing all three children. CP 63. The DVPO did not prohibit visitation, instead Mr. Aiken's visitation was "subject to future orders in a dissolution or paternity action." CP 64. Around the same time that the DVPO was entered, the parties' 14-year old daughter attempted to commit suicide due to fear of visitation with the Appellant. CP 38, 331. Mr. Aiken refused to voluntarily suspend his visitation pending further recommendation from the child's medical professionals. CP 284-292.

As a result Ms. Aiken filed a motion for reconsideration to prohibit all contact between the 14-year old daughter and Mr. Aiken.³³ CP 272-292. On revision, even though the superior court was provided with medical documentation regarding domestic violence,³⁴ it did not prohibit *all* contact but continued to order that visitation be "subject to future

³³ Mr. Aiken's response to the motion for reconsideration is telling. He blamed Ms. Aiken's counsel, Ms. Aiken and the parties' 14-year old daughter herself. Mr. Aiken accused Ms. Aiken's counsel for orchestrating the DVPO proceeding against him. CP 30. Mr. Aiken accused Ms. Aiken of fabricating the allegations. CP 31. Mr. Aiken also alleged that Ms. Aiken "manipulated the court system" and she "damaged my relationship with my daughters." CP 32-33. Mr. Aiken also blamed the 14-year old daughter's suicide attempt on Ms. Aiken, stating that the daughter was "enmeshed with Cindy's [Ms. Aiken's] feelings that she has said and done things that are not rational." CP 33. There was no evidence produced indicating that any of these assertions were based in fact.

³⁴ See *supra* n. 14 regarding medical documentation provided to the superior court.

orders in a dissolution or paternity action” and specifically noted the ongoing dissolution action in case number 13-3-02944-0. CP 18-19. The superior court also restrained Mr. Aiken from contacting the 14-year old daughter, excluded him from her home and school and from coming within 100 yards of either, but did so “subject to future orders in a dissolution or paternity action.” CP 18-19.

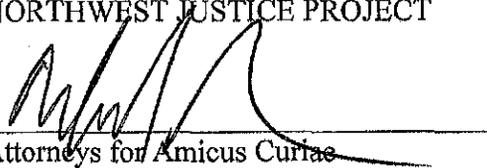
The superior court had ample proof of imminent harm in the form of statements made to medical professionals for treatment. These statements directly explain why the child attempted to commit suicide and self-harm: domestic violence perpetuated by the Mr. Aiken.

V. CONCLUSION

For the reasons set forth herein, Amicus respectfully urges this Court to affirm the Court of Appeals’ decision and find no right to depose and/or cross-examine children in a DVPO proceeding.

RESPECTFULLY SUBMITTED on this 21st day of September, 2016.

NORTHWEST JUSTICE PROJECT



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SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

v.

CYNTHIA L. AIKEN,

Respondent

No. 92631-0

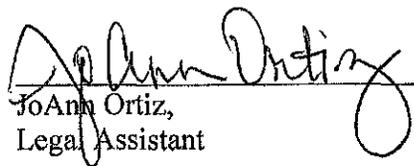
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I certify that on the 29th day of September, 2016, I caused a true and correct copy of the **Motion to File Brief of Amicus Curiae Northwest Justice Project** and the **Brief of Amicus Curiae Northwest Justice Project** to be served on the following, via North Sound Due Process, legal messenger service:

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- Motion of Northwest Justice Project for Leave to file Amicus Curiae Brief
- Proposed Brief of Amicus Curiae Northwest Justice Project
- Certificate of Service

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